

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6211

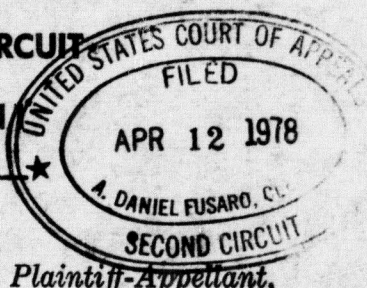
To be argued by
ELAINE C. BUCK

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6211



FRED CHERRY,

Plaintiff-Appellant,

—against—

THE POSTMASTER GENERAL OF THE
UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANT-APPELLEE

DAVID G. TRAGER,
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Docket No. 77-6211

FRED CHERRY,
Plaintiff-Appellant,
—against—

THE POSTMASTER GENERAL OF THE UNITED STATES,
Defendant-Appellee.

BRIEF FOR THE DEFENDANT-APPELLEE

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Mark A. Costantino, J.), dated and entered September 12, 1977(1) denying plaintiff Cherry's motion to convene a three-judge-court pursuant to 28 U.S.C. §§ 2282 and 2284 to enjoin the Postmaster General from impeding, in any manner, the delivery of certain postcards mailed by Cherry and (2) dismissing this action for lack of a justiciable case or controversy.*

Statement of the Case

This action is the third in a series of lawsuits in which Fred Cherry, *pro se*, assisted by Alan Charmatz and Julius Tortorice, has sought to convene a three-judge-court to enjoin the enforcement of 18 U.S.C. § 1718 and

* The order is set forth in the joint appendix at A. 60.

39 U.S.C. § 3001, which prohibit the mailing of libelous, scurrilous or defamatory postcards, and to declare these sections unconstitutional, on their face and as applied, because they violate the First Amendment.*

In his first action, which was brought in the District Court for the District of Puerto Rico in 1966, Cherry claimed that his rights to free speech and to property had been abridged by the Postmaster's refusal, under sections 1718 and 3001, to deliver postcards which admittedly defamed a clergyman as a homosexual.** The Court held that since there is no constitutional right to mail defamatory postcards, Cherry was not entitled to have a three-judge-court pass on the constitutionality of the statutes in question. The Court also held that the prohibition against the mailing of defamatory postcards does not amount to an abridgment of First Amendment rights since the printed matter is in fact otherwise mailable (*i.e.*, if enclosed in an envelope and sent through the mails). See, *Cherry v. Postmaster General*, 272 F. Supp. 982 (D.P.R. 1967), *aff'd* without opinion by the First Circuit, *cert. denied*, 391 U.S. 914 (1968).

Cherry's second challenge to sections 1718 and 3001 was litigated in 1971 in the District Court for the Southern District of New York.*** The impetus for that action was the mistaken and temporary detention of an oversized postcard on which was printed the essay "Homosexual Child-Molesters To Become School Teach-

* The second part of 18 U.S.C. § 1718, which makes it an offense to knowingly mail non-mailable matter (*i.e.*, libelous, scurrilous, or defamatory postcards) is not in issue here since it has never been claimed that prosecution is threatened or imminent.

** Julius Tortorice intervened in the first action to assert an infringement of his right to receive materials through the mails.

*** Alan Charmatz was also a plaintiff in the second action.

ers". That action was dismissed as moot based upon the Government's concessions that: (1) the local postmaster had no authority to withhold the postcards in question; (2) there was no order, regulation or statute prohibiting Cherry from mailing the postcards in question or authorizing the Postmaster to withhold same; and (3) there was no likelihood of official interference with Cherry's postcard campaign against homosexuals. *Cherry v. Postmaster General*, 332 F. Supp. 785 (S.D.N.Y. 1971).

Cherry and Alan Charmatz commenced this action on August 12, 1976, the last effective date of the now de-mised three-judge-court statute, claiming that the Government had reneged on its prior representations and that accordingly a three-judge-court should be convened to enjoin the enforcement of sections 1718 and 3001 and to declare the sections unconstitutional (A. 2, 3-9). Specifically, Cherry and Charmatz claim that some postcards which were printed by Cherry in 1974 and which bear his essay "New York City Councilmen Sell Out to Homosexual Child-Molesters" were rejected as non-mailable in Brooklyn in 1974, in Manhattan in 1975 and in Puerto Rico in 1975 and 1976 (A. 4-6, 10, 24-29).*

In its answer to plaintiffs' complaint, filed on November 12, 1976, the Government conceded that Cherry has a right to mail the postcards in issue and that the postal service has no authority to reject them (A. 16). The Government also conceded that Cherry's postcards had been erroneously rejected as non-mailable on two separate occasions (A. 18-19, 38, 41). First, in the summer of 1974, a postcard addressed to Cardinal Cook and mailed by registered mail (Register No. 13053) from the Gen-

* An allegedly true copy of the postcard was annexed to the complaint (A. 10). This is a different essay than the essays involved in the action in the Southern District.

eral Post Office in Brooklyn was erroneously detained for possible violation of sections 1718 and 3001 (A. 19, 38). Cherry received an apology from the Brooklyn Postmaster in December 1974 and assurances that the mistake would not be repeated (and it was not) (A. 41). The second incident occurred in Manhattan in 1975, when a clerk at the Church Street Post Office refused to accept a postcard but only after he was advised by Cherry himself that the message on the card violated postal regulations (A. 18). The Government denied that there were any instances in Puerto Rico where a postal employee refused to accept the postcards in issue because they were non-mailable. However, the Government admitted that there were four instances, three in 1975 and one in 1976, where postal employees in Puerto Rico refused to accept postcards for registered mail on the sincere but mistaken belief that the cards could not be sent by registered mail because they could not be sealed as required in Postal Service Manual § 161.32 (A. 18).

On July 18, 1977 Cherry filed a motion to convene a three-judge-court (A. 2, 21). In support of his motion Cherry submitted his own affidavit and an affidavit from Julius C. Tortorice (A. 22-29). In his affidavit, Cherry claimed that in addition to the one incident in Brooklyn in 1974 and a second incident in Manhattan in 1975, his postcards were rejected in San Juan, Puerto Rico on an unspecified date in March 1975, on May 1 and 5, 1975 and on March 3, 1976 (A. 25-29). Cherry asserted that while the official reason given for the rejections was that the postcards could not be registered, he was told informally on several occasions in May, 1975 and on March

3, 1976 that his postcards were being rejected because of their content (A. 25-29).*

On September 1, 1977 the Government filed a cross motion to dismiss this action for lack of a justiciable case or controversy (A. 43). In support of its motion, the Government submitted, among other documents, affidavits from eight postal employees supporting its account of the incident in Manhattan (A. 44) and the incidents in San Juan, Puerto Rico (A. 45-53).

On September 7, 1977, the district court heard oral argument by Fred Cherry, *pro se*, and the Government on the motions before it (A. 2). Relying on the Government's representations that Cherry has a right to mail the postcards in question and that the postal service has no authority to withhold them and will not withhold them in the future, and noting that there appeared to be only two incidents, neither recent, where Cherry had been mistakenly prevented from mailing the postcards in issue, Judge Costantino found that there was no justiciable case or controversy (A. 60). Accordingly, he denied Cherry's motion to convene a three-judge-court and dismissed the complaint (A. 61). Judge Costantino also ordered the Postmaster not to seize, detain, impound, forfeit, destroy or in any other manner impede the delivery of the postcards in issue (A. 61).

On September 22, 1977 Cherry filed a motion in the district court for an order vacating the judgment denying his motion to convene a three-judge-court and dis-

* On one occasion in May 1975, Cherry claims that he was advised by an employee, Ignacia Padilla, that the postcards were non-mailable because of the "footnotes" they contained. Mr. Cherry states: "I believe the term 'footnotes' referred to comments which I had added in freehand at the bottom of said postcards, commenting unfavorably on the actions of various postal officials." (A. 26).

missing his complaint (A. 62). Cherry's motion was denied by an order dated October 14, 1977 and entered on October 17, 1977 (A. 73). This appeal followed.

A R G U M E N T

POINT I

This Action Does Not Meet The Requirements Necessary to Convene a Three-judge-court.

The extraordinary act of convening a three-judge-court can only be taken where: (1) the constitutional question raised is substantial; (2) there is a basis for equitable relief; and (3) the case otherwise comes within the requirements of the three-judge-court statute. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962).^{*} See also *Cherry v. Postmaster General*, *supra*, 272 F. Supp. 982, 984 (D.P.R. 1967), *aff'd* without opinion by the First Circuit, *cert. denied*, 391 U.S. 914 (1968) and *Cherry v. Postmaster General*, *supra*, 332 F. Supp. 785, 788 (S.D.N.Y. 1971). A claim is insubstantial, for purposes of convening a three-judge-court, where there is an absence of federal jurisdiction, or a lack of substantive merit in the constitutional claim, or because injunctive relief is otherwise unavailable. *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970).

In the present case there is no substantial federal question or need for equitable relief because, as the district court properly found, there is no legally cognizable dispute between the parties. The Government has readily

^{*} All of the three-judge-court cases cited in this brief pre-date the new three-judge-court legislation which went into effect the day after Cherry filed this action.

conceded from the inception of this action and even before its commencement that Cherry has a right to mail the postcards in issue (postcards different from those involved in the action in the Southern District of New York) and that the postal service has no authority to reject them (A. 16, 41).

The Government has also admitted that on two separate occasions, one in Brooklyn in 1974 and the other in Manhattan in 1975, low ranking postal employees erroneously rejected the postcards in issue on the ground that they were non-mailable (A. 18, 19, 38, 41).

However, the fact that there were two or even, as Cherry claims, more instances where some of Cherry's postcards were rejected as non-mailable does not under the circumstances of this action detract from the force of the Government's good faith representations that it has no authority to interfere with the exercise of Cherry's rights and that there is no likelihood of official interference in the future with his postcard campaign against homosexuals. Indeed, even if Cherry's version of the facts is accepted as true and examined in a light most favorable to him, the facts admit of only one permissible inference—that Cherry orchestrated incidents because he wanted three-judge-court litigation.

The history of this action serves to bring the facts into sharp focus. In his first action in the District of Puerto Rico, Cherry made the fatal error of admitting that the postcards in question, which are not dissimilar to those in issue here, were libelous, scurrilous and defamatory. Not one to make the same mistake twice, Cherry expressly asserted in subsequent actions that the cards were not libelous, scurrilous and defamatory (A. 4). See also *Cherry v. Postmaster General*, *supra*, 332 F. Supp. at 788. Cherry's second effort to convene a three-judge-court was brought in another judicial district

and was based on another incident. It failed nevertheless because the Government conceded, among other points, that the low ranking official responsible for the incident was not authorized to detain the cards in question and that Cherry was free to mail them. Cherry apparently gained some insight from his second lawsuit as well because he brought his third action in still another judicial district (the Eastern District of New York), despite the fact that of the many instances of which he complains only one had occurred in that judicial district. Furthermore, with the exception of the single incident in the Eastern District of New York in 1974, which occurred fortuitously for his purposes, Cherry admittedly left nothing to chance.* Equipped with postcards which were only relevant, if at all, in 1974 when they were admittedly printed, Cherry embarked on a relentless cam-

* At page 24 of his brief, plaintiff attacks defendant's credibility stating that despite the fact that "[i]n a letter dated December 11, 1974, the Brooklyn Postmaster apologized to the plaintiff and assured him that 'suitable instructions had been issued to postal employees concerned, to prevent a recurrence'" (A. 19), defendant's answers to Cherry's interrogatories indicate that "... there is no evidence that such instructions were ever issued." However, plaintiff misstates the contents of the December 11, 1974 letter. That letter, which is reprinted at p. 41 of the Joint Appendix, merely states,

Inasmuch as a ruling was made on this type of mailing in your favor prior to this incident, we are sending a copy of this letter to the Postmaster, New York, New York 10001. That official will be requested to alert all employees and advise them of the mailability of this type of correspondence.

In fact, on February 7, 1975, sections 123.31 and 123.32 of the Postal Manual were issued to postal employees throughout the United States instructing them not to refuse written, printed or graphic matter if the mailer demands that the matter be accepted (A. 39, 42). Furthermore, the fact remains that after the incident and the apology this mistake was never repeated in Brooklyn.

paign to provoke low-level postal employees to reject his postcards (A. 24).

In the single incident which occurred in Manhattan in 1975, Cherry's postcard was refused but only after he represented that the clerk's acceptance of the card would constitute a violation of postal regulations (A. 44). Cherry only casually alludes to this fact when he states in his affidavit in support of his motion to convene a three-judge-court, "I asked the employee at the registry window whether or not my postcard violated Section 123.44f of the Postal Service Manual." (A. 28). Since Cherry's card was refused at his own insistence, he hardly has standing to protest the denial of any of his rights. Cf. *Shorter v. United States*, 412 F.2d 428, 431 (9th Cir. 1969).

Cherry neglects to state in either the aforementioned affidavit or his complaint that the address side of his postcards bear the following printed warning:

NOTICE
TO ALL POSTAL EMPLOYEES & CIVIL
LIBERTARIANS

This card is the eleventh in a continuing series. Although these cards contain nothing but truthful information and fair comment on persons and organizations in respect of public affairs, they nevertheless VIOLATE Sections 123.45 & 123.82 of the Postal Service Manual. In addition, under 18 U.S.C. § 1718 (U.S. Penal Code), the sender of these cards actually faces imprisonment for the "crime" of revealing the truth!

Now 123.44F (A. 58)

Indeed, lest it be overlooked, Cherry, on at least one occasion, artfully drew conspicuous arrows directing the reader's attention to the warning (A. 54).

Cherry is also less than candid when he represents Exhibit "A" of his complaint to be a true copy of the message side of the postcards in question (A. 4, 10). The first suggestion of this appears in paragraph 8 of the aforementioned affidavit where he states that when he tried to mail one of his postcards in Puerto Rico on May 1, 1975 he was told it was non-mailable because of the 'footnotes' (A. 25-26). Cherry then explains, "I believe the term 'footnotes' referred to comments which I had added in freehand at the bottom of said postcards, commenting unfavorably on the actions of various postal officials." In fact, at various times Cherry embellished his postcards with the following:

AN OPEN LETTER TO "CHICKEN-SHIT"
LLITERAS, SUPERINTENDANT OF OPERA-
TIONS AT THE SAN JUAN GPO

Look, you miserable chicken-shit, these cards are mailable. The fact that you got this card proves it. You are violating my rights by taking that faggot Postal Inspector Wilson's advice and refusing to accept my cards for mailing. Wilson knows these cards are mailable. That should have been obvious to you before now. If you don't believe me, ask Rodriguez.

Yours contemptuously, Fred Cherry (A. 59)*

AN OPEN LETTER TO THEODORE STANGER:
SIR: ALTHOUGH THIS CARD WAS PRINTED
IN 1974 THE INFORMATION HEREIN IS
RELEVANT TO MIAMI TODAY. THE REA-
SON I AM SENDING YOU THIS CARD BY

* The printed warnings and the handwritten comments re-printed herein appear on postcards which were sent to Postal employees or were xeroxed by postal employees with Cherry's permission.

REGISTERED MAIL IS THAT THERE ARE A COUPLE OF FAGGOT POSTAL INSPECTORS IN SAN JUAN, WHICH IS WHERE I AM MAILING THIS CARD. IF I WERE TO SEND THIS CARD BY REGULAR MAIL, THOSE FAGGOT POSTAL INSPECTORS WOULD GRAB IT, AND I WOULD NEVER KNOW IT.

YOURS TRULY,
Fred Cherry (A. 55)

AN OPEN LETTER TO JOSEPH A.
CALIFANO, JR.:

Your client Nadar isn't the only one who has trouble with the Postal "Service". You should see what goes on here. There is a character in the Post Office here named Stuart who carries on as if he were a member of the local Gay Liberation Front.

Yours truly,
Fred Cherry (A. 57)

DEAR REV. PREVO,

CONGRATULATIONS FOR STOPPING THE PASSAGE OF A BILL SIMILAR TO THE BILL DESCRIBED ABOVE. THE REASON I SEND YOU THIS CARD BY REGISTERED MAIL IS THAT I AM MAILING IT FROM SAN JUAN, PUERTO RICO AND THERE ARE A PAIR OF FAGGOT POSTAL INSPECTORS HERE, NAMED WILSON & STUART, WHO ARE IN THE HABIT OF SURREPTITIOUSLY SEIZING OTHER COPIES OF THIS CARD.

YOURS TRULY,
Fred Cherry (A. 56)

Postal employees are humanly fallible. Thus, if, as Cherry claims, his postcards were on all six occasions

illegally rejected because of their content (which they plainly were not), these isolated mistakes, while not condonable were, in light of Cherry's manipulative conduct, predictable.*

It is also significant that after waiting months and in some instances years to complain about the incidents in question, Cherry filed his action on August 12, 1976, the last effective date of the now demised three-judge-court statute. See Pub. L. 94-381 amending 28 U.S.C. §§ 2284, 2403 and repealing sections 2281 and 2282.

In sum, it makes no difference whether Cherry's postcards were rejected as non-mailable on two or even six occasions, as he alleges. The conclusion is inescapable that this lawsuit is a sham; that the Government has not reneged on its representations; and that, as the district court properly found, there is no case or controversy.

It is also clear that this action does not meet the other requirements necessary to convene a three-judge-court. Neither section 1718 nor section 3001 authorize postal employees to reject printed matter for mailing as non-mailable. Indeed, Postal Manual sections 123.32 and 123.35, issued on February 7, 1975, expressly require postal employees to accept all printed matter for mailing (A. 42). Consonant with these provisions, if an employee believes that matter is non-mailable, he must immediately contact the inspection service. If the inspection service and the local United States Attorney are of the opinion that the matter is non-mailable, an applica-

* We note in this regard that, despite the apparently enormous quantities of postcards mailed by Cherry in his relentless campaign (see, *e.g.*, Plaintiff's Brief, p. 9; A. 24), he can—doubtless to his own disappointment—cite only a few isolated instances (some of them disputed) where postcards were mistakenly rejected because of their content.

tion must immediately be made for a search and seizure order consonant with the requirements of *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (A. 42,36). See also copy of letter of George Davis, Assistant General Counsel, Consumer Protection Office, United States Postal Service, annexed to defendant's memorandum of law in the district court. Thus, plaintiff Cherry's complaints here are directed not to the statute but rather to the unauthorized acts of low-ranking postal employees. Since it is unauthorized acts and not enforcement of a statute which plaintiff actually seeks to enjoin, it is neither necessary nor proper to convene a three-judge-court. *Woe v. Mathews*, 408 F. Supp. 419, 427 (E.D.N.Y. 1976).

POINT II

The District Court Properly Denied Cherry's Motion to Convene a Three-judge-court and Dismissed This Action.

Cherry's contention that the district court erred in looking beyond the complaint to determine whether to convene a three-judge-court reflects a fundamental misapprehension of the function of the single judge. The Supreme Court has repeatedly stressed the fact that the three-judge-court legislation is to be narrowly and strictly construed. *Mitchell v. Donovan*, 398 U.S. 428, 432 (1970); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); and *Phillips v. United States*, 312 U.S. 246, 251 (1941). The inquiry of the single judge does not end with the determination that the complaint alleges the unconstitutionality of the statute, irreparable injury and contains a prayer for injunctive relief. The single judge is required to search the entire record to determine whether the prerequisites for a three-judge-court are actually met. To illustrate, in *Sellers v. Regents of University of California*, 432 F.2d 493 (9th Cir. 1970), the Court looked to the affidavits and the pleadings to determine whether the district court

had correctly refused to convene a three-judge-court and dismissed the action. Upon finding them insufficient to state a claim for injunctive relief, the court, treating the dismissal of the district court as a summary judgment under Rule 56, affirmed the judgment. See also *Frischman v. Durand*, 350 F. Supp. 79, 82-83 (S.D.N.Y. 1972); and *Majuri v. United States*, 431 F.2d 469, 473 (3rd Cir. 1970). Any other interpretation of the single judge's power would allow an individual, armed with little more than a sufficiently imaginative complaint and affidavit, to foist a three-judge-court on an already severely beset and overburdened court. Cf. *Wolfish v. Levi*, — F.2d — (2d Cir.), decided 1/24/78, slip op. 1206-1208.

Where a search of the record discloses that the claim is spurious or where there is no cause or controversy, the single judge can and should deny the application for a three-judge-court and dismiss the action. *Cook v. Board of Education of Salmon River Cent. Sch. District No. 1*, 424 F.2d 995 (2d Cir. 1970); *Long v. District of Columbia*, 469 F.2d 927, 931 (D.C. Cir. 1972); *Hobson v. Tobriner*, 255 F. Supp. 295 (D.C. 1966) and *Cherry v. Postmaster General*, *supra*, 332 F. Supp. at 788.

Accordingly, in the present case where it is patently clear that there is no case or controversy and that the entire action is a farce, the denial of plaintiff's application to convene a three-judge-court and the dismissal of the complaint was wholly proper.*

* Since a declaratory judgment action must also involve an actual controversy, those sections of the complaint demanding a declaratory judgment were also properly dismissed. *Cherry v. Postmaster General*, *supra*, 332 F. Supp. 790.

CONCLUSION

The judgment of the District Court denying plaintiff Cherry's application to convene a three-judge-court and dismissing this action should be affirmed.

Dated: Brooklyn, New York
April 13., 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss
ELLA L. HILL

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 13th day of April 19 78 he served a copy of the within
Brief for Defendant-Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Melvin L. Wulf, Esq.
Attorney for Plaintiff-Appellant
Clark, Wulf & Levine, Esqs.
113 University Place
New York, New York 10003

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County
of Kings, City of New York.

Ella L. Hill
ELLA L. HILL

Sworn to before me this

13th day of April 19 78

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1979